United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-7351

United States Court of Appeals For the Second Circuit

KARL M. NEIMAND, *et al.*,
Plaintiffs-Appellees,

-and-

GEORGE COOPER, *et al.*,
Plaintiffs-Intervenors,

-and-

GEORGE SCHWARTZ, *et al.*,
Additional Plaintiffs-Intervenors,

-against-

MENDON PROPERTIES, INC., *et al.*,
Defendants-Appellants,

-and-

EUGENE RODIN, *et al.*,
Defendants.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF OF PLAINTIFFS-APPELLEES

LIPPER, LOWEY & DANNENBERG
Attorneys for Plaintiffs-Appellees
Karl M. Neimand, et al.
747 Third Avenue
New York, N.Y. 10017

Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel.: (212) 447-5358

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Authorities

Statutes

Rules

United States Court of Appeals For the Second Circuit

KARL M. NEIMAND, *et al.*,
Plaintiffs-Appellees,

-and-

GEORGE COOPER, *et al.*,
Plaintiffs-Intervenors,

-and-

GEORGE SCHWARTZ, *et al.*,
Additional Plaintiffs-Intervenors,

-against

MENDON PROPERTIES, INC., *et al.*,
Defendants-Appellants,

-and-

EUGENE RODIN, *et al.*,
Defendants.

On Appeal from the United States District Court for the Eastern District of New York

---

BRIEF ON BEHALF OF PLAINTIFFS-APPELLEES

Preliminary Statement

Some eleven months after execution of a settlement agreement among sophisticated businessmen (including a lawyer), all represented by experienced counsel, upon an application by the plaintiffs-appellees for judgments, the District Court was asked by two of these sophisticated businessmen (two of four principal individual defendants), to void and set aside that settlement for "duress". The District Court (Judge Neaher) (i) having knowledge of the contested issues and of the parties' representation by counsel throughout the action, by virtue of its having heard argument with respect to at least six contested motions in this vigorously fought action, including motions for summary judgment, for dismissal of the complaint, and for class determination and having presided at pretrial conferences (1a-5a); (ii) as a result of the defendants' performance or attempted performance, including that of the appellants, under the settlement agreement for some four to six months (24a-46a); (iii) by virtue of the post-settlement written admissions by the defendants (including appellants), or on their behalf, as to the validity of that settlement agreement (65a-66a; 74a-78a); (iv) and after crediting the appellants with the benefit of every fair inference as to the occurrences of the alleged threats which underlie the claim of duress, determined summarily that the claims of duress were without merit (89a-94a).* The District Court further found that this defense was interposed solely for delay and was frivolous. Upon application made and pursuant to the provisions of the settlement agreement, it awarded attorneys fees of $2,480, jointly and severally against appellants Vogel and Boklan.

---

* Numbers in parenthesis refer to pages of the Joint Appendix. Conferences and arguments before the Court occurred almost monthly, on September 16, 1974, October 15, 1974, November 22, 1974 and January 3, 1975, among others (2a-4a)

(Section 18.3(v) at 352a; 32a, 93a-104a). Judge Neaher wrote:

> "Defendants Boklan's and Vogel's claims that the contract is unenforceable due to duress in the execution of the Agreement are denied as without merit. Assuming the alleged threats of criminal prosecution and reporting to the bar association are sufficient to constitute duress, the papers reveal that the 'threats' were effected and the investigations, of which defendants had knowledge, were commenced before the Agreement was executed and closed. It is inconceivable that defendants signed the Agreement hoping that the 'threats' would not come to pass. Defendants also performed or attempted to perform the Agreement and may be said to have ratified it. The contract is enforceable against them."*
>
> (92a-93a)

This Court is now asked to overturn those rulings.

STATEMENT OF THE CASE

The individual appellant Seymour Vogel ("Vogel"), a sophisticated businessman and real estate broker, and his attorney Kenneth E. Boklan ("Boklan") appeal from the entry of joint and several judgments, entered June 28, 1976, in favor of ten of the some 30 or more plaintiffs and plaintiff-intervenors. Appeals have also been taken by Vogel on behalf of eight corporations which he controls. As to one of these, the appellant Cole-Hunt Development Corp., no judgment on June 28, 1976 was in fact entered

---

* The decision of the District Court is not officially reported.

(7a-11a; 95a-106a).* The judgments were entered after the occurrence of defaults, conceded below, under a settlement (89a-94a; 269a-406a).

Defendants Eugene Rodin ("E. Rodin"), his son, Bruce Rodin, and their corporations Godsberg Realty Corp. and Rillstone Properties, Inc., against whom substantial judgments on behalf of the appellees were also entered on June 28, 1976, because of the defaults, have not appealed (98a-104a). Those judgments aggregating in excess of $2 million as to those defendants are now final. These defendants had not claimed duress. Likewise no appeal was taken by the defendant Bervo Associates, Inc., whose address is listed in the judgments as c/o Vogel, from judgments entered on June 28, 1976 on behalf of plaintiffs-appellees Ingram and Kanton, aggregating approximately $176,000 (9a-10a; 99a, 100a, 105a).

Further, the appellants have deliberately not appealed from substantial judgments entered on July 6, 1976, against them in favor of other plaintiffs and plaintiff intervenors in this action, upon a motion filed on June 29, 1976, which motion appellants deliberately did not oppose. In an affidavit sworn to September 22, 1976, filed in this Court by Leon Malman, Esq., attorney for Vogel and his cor-

* Vogel filed his notice of appeal on July 21, 1976 and Boklan on July 30, 1976. By order dated September 28, 1976 this Court directed that all counsel adhere to the Scheduling Order requiring appellants' briefs to be served by October 12th. By October 19th, Boklan had not filed his brief or an undertaking for costs. By motion filed October 19, 1976, appellees moved to dismiss his appeal, which is returnable November 9th. Appellees' brief must be filed by November 12th. In an affidavit of November 2nd, 1976 of his attorney, Boklan concedes his default but requests additional time to file a brief or the right to rely on " . . . appellant . . . Vogel's brief and argument." His attorney also claims that a certified check in the amount of $250 payable to the United States Treasurer was forwarded on November 1st to the District Court.

porations, Mr. Malman conceded that he deliberately did not oppose the second set of motions for judgment. ([Docket entries 85-86] 6a). That second set of judgments is now final and is not before this Court for review.

All of the judgments were entered after motions, on notice, pursuant to the directions of the District Court, as a result of the provisions of a complex and lengthy settlement agreement entitled "Purchase Agreement dated as of July 17, 1975, (the "Settlement Agreement"), and ensuing defaults by the defendants thereunder. That agreement, comprising over 100 pages and numerous schedules (reproduced in the Joint Appendix at 269(a) to 409(a)), was executed by the defendants on July 17, 1975, in the physical presence of each of them and only their own counsel (370a-371a); delivered to and exchanged with plaintiffs' counsel by defendants' counsel on July 28, 1975 (72a-73a); and closed October 6, 1975 (65a).* On October 7, 1975, counsel for the defendants, acting through the attorney for E. Rodin, (Geoffrey M. Kalmus, Esq., of the firm of Nickerson, Kramer, Lowenstein, Nessen, Kamin & Soll) wrote to Judge Neaher, to whom the action had been assigned on its being filed, as follows:

> "Dear Judge Neaher
>
> You will recall that we visited with you in late June to report on the progress of the settlement of this litigation and to explain to you the continuing role of the Court under this rather complex settlement agreement among the parties.
>
> The settlement agreement was signed not long after we met with you and I am pleased to report that the closing of the settlement was effected yesterday. Upon the closing the litigation was discontinued against four of the many defendants but, as the settlement agreement provides, it

* Also at the closing on October 6, 1975, the respective attorneys for the parties executed a stipulation of discontinuance as to four other individual defendants, pursuant to the provisions of the Settlement Agreement. (5a; 410a-413a).

remains pending against the principal defendants as well as a number of corporations.

The settlement provides for the payment of moneys and the performance of various acts by certain of the defendants during the next two years. If all goes well, there should be no occasion for any action by the Court during this period and, hopefully, the litigation will be discontinued against the remaining defendants no later than early October, 1977." (65a-66a)

From October 6, 1975 to December 1975, the appellants and the defendant E. Rodin performed under the Settlement Agreement. On October 6, 1975, approximately $300,000 was delivered on behalf of the defendants to Charles Hecht & Company ("Hecht"), the fiscal agent under the Settlement Agreement; certain real estate was conveyed to Hecht; certain real estate mortgages were satisfied; and other activities performed pursuant to the provisions of the agreement (60a; 72a-73a; 273a-303a). The $300,000, initially delivered to defendants' counsel on July 17, 1975, and then to Hecht on October 6, 1975, consisted of certain credits due the appellants et al; $179,669.49 paid by E. Rodin; and $99,278.69 paid by appellants Vogel and Boklan (72a-73a; 289a-292a; 387a; 394a).*

* The Settlement Agreement was one of four agreements executed on July 17, 1975 by appellants Vogel and Boklan and delivered at the closing. The other three agreements, the Yaphank Agreement, the Shirley Agreement, and the Westhampton Agreement involving real estate in Yaphank, in Shirley and in Westhampton, are not involved in this appeal (72a-73a). Nor have appellants sought to void those agreements.

Hecht, although a party to the Settlement Agreement for purposes of carrying out its provisions, was not a party to the action and was not before the District Court (273a; 279a; 337a-343a; 372a). However, its rights and liabilities could be affected by these appeals (44a-51a). Further the monies paid to Hecht have been exhausted in "carrying" the properties, pursuant to the provisions of the Settlement Agreement (Sections 5 and 15.1(c) of the agreement at 289a-303a and 337a-338a). These monies were used with the approval of the defendants including the appellants.

The Settlement Agreement, among its detailed provisions, provided for procedures to be followed in the event the defendants defaulted under the agreement. Section 17 deals with "Events of default, and curing defaults" (345a-348a); Section 18 sets forth detailed conditions and procedures as to the application for judgments (348a-354a); Section 19 sets forth procedures for "Collection upon a judgment", including priorities in connection with execution (354a-360a)*; Section 23 deals with the "Effect of bankruptcy" (365a). In the event of disputes, the parties agreed to submit the dispute to the District Judge or a magistrate for a binding final decision, unreviewable by appeal or otherwise, in the nature of arbitration (363a-364a).

After December 1975, the defendants, including the appellants, attempted to continue to perform, but were unsuccessful (24a-28a; 34a-42a; 44a-51a).

By late February 1976, although still attempting to perform, the appellant Vogel and the defendant E. Rodin were in substantial default under the provisions of the Settlement Agreement, the occurrences of which events of default were not contested below (25a-29a; 34a-51a; 60a; 89a-91a).

Accordingly in April 1976, the appellees and other plaintiffs moved in the District Court for judgments, pursuant to the provisions of the Settlement Agreement (7a-13a; 417a-419a). For the first time, by uncorroborated affidavits sworn to May 3, 1976, Vogel and Boklan both claimed, respectively that he had executed the Settlement Agreement on July 17, 1975 under "duress" (14a-23a).

---

* For example the defendants, including appellants, bargained for and received some unusual provisions. One requires the judgment creditors to execute on certain real property within one year after judgment, or the properties are returned to Vogel and E. Rodin (Sec. 19.4 at 359a to 360a).

APPELLEES' COUNTERSTATEMENT OF THE ISSUES

These appeals present the following issues:

1. Did the District Court abuse its discretion, in directing the entry of judgment on behalf of certain of the plaintiffs-appellees in accordance with the provisions of the Settlement Agreement, and in rejecting appellants' claims of alleged duress in connection with its execution, founded on alleged threats of criminal prosecution and other similar threats, made prior to January, 1975,

A. Where the Settlement Agreement was

(i) executed by the appellants on July 17, 1975 in the presence of their own attorneys, the firm of Rogers & Wells, Esq., with no plaintiff or plaintiffs' representative present;

(ii) delivered by appellants' attorneys to plaintiffs' counsel, in exchange for plaintiffs' executed agreements on July 28, 1975;

(iii) closed by appellants' attorneys on October 6, 1975, at a time when the appellants could have elected to withdraw from the settlement;

and at all such times appellants had knowledge of a then pending criminal investigation by the office of the District Attorney of Nassau County;

B. Where appellants Vogel and Boklan performed under or in connection with the Settlement Agreement or attempted to perform thereunder during the period October 1975 to April 1976;

C. Where there was no meaningful physical contact between appellants and the plaintiffs or their representatives after December 1974 and all relevant physical contacts prior thereto had been in the presence of appellants' counsel; and

D. Where from July 1974 to March 1976, the appellants were represented by the firm of Rogers & Wells, and no supporting or corroborating affidavit from Rogers & Wells with respect to the alleged events of alleged duress was submitted?

2. Are the appellants estopped from raising the issue of duress

(i) by their conduct in having performed under or in connection with the Settlement Agreement or by their conduct in attempting to perform thereunder for a period of six months, and

(ii) by their laches in raising these claims for the first time approximately ten months after the execution of the Settlement Agreement?

3. Was the finding of the District Court that appellants had ratified the Settlement Agreement clearly erroneous?

4. Should appellants have raised the issues of the enforceability of the Settlement Agreement by way of a plenary action independently brought, when all parties who benefitted from the provisions of the Settlement Agreement and all parties whose rights would be adversely affected should the Settlement Agreement be set aside, were not before the District Court or within its jurisdiction?

5. Did the District Court abuse its discretion in awarding counsel fees of $2,480 against appellant Vogel and Boklan, pursuant to the provisions of the Settlement Agreement which provided that the District Court, in its discretion, may include an award for attorneys' fees incurred in obtaining judgment "if the Court shall find . . . that opposition to the entry of judgment was frivolous or interposed solely for purposes of delay" and was such a finding clearly erroneous?

THE FACTS

This action was commenced on June 28, 1974, by six investors as a class action to recover over $2 million invested by some 45 investors, in connection with the purchase of eight parcels of real estate in the State of New Jersey (107a-169a; 274a-276a; 377a-385a).*

The plaintiffs alleged with specificity causes of action for fraud under the federal securities laws and the common law, alleging wrongful conduct in connection with the formation and management of eight joint ventures in connection with the eight properties (107a-169a; 215a; 268a; 274a-275a). The plaintiffs in substance sought a return of their monies by way of rescission. On February 21, 1975, after contested motions, exhaustively briefed and argued, the District Court denied class, but granted leave to investors to intervene and file an amended complaint (2a-5a; 215a-268a). The defendants never answered that complaint because of the immediately ensuing exhaustive settlement negotiations commencing in March 1975, and the ultimate consummation of the settlement in July and October 1975 (62a; 414a-415a).

Three of the properties, denominated as either the "109 property" (or "deal" or "transaction"), the "150 property" (etc.) and the "220 property" (etc.), are in Camden County, New Jersey and are referred to as the South Jersey Properties (109a-110a; 218a-219a; 276a-277a). The other five properties are in northern counties of New Jersey and are referred to as the North Jersey Properties (ibid.)

The distinction between the South Jersey Properties and the North Jersey Properties became important as the litigation ensued. While the complaint and amended

* In the aggregate, $1.3 million was invested in connection with the purchases and in excess of $700,000 for carrying the properties. Not all investors invested in the same property (377a-385a).

complaint charged appellants Vogel and Boklan with liability with respect to all eight properties, (i.e., South and North Jersey Properties combined (215a-268a)), the liability of Vogel and Boklan under the Settlement Agreement was limited to the South Jersey Properties only, while the liability of E. Rodin under that agreement extended to both the South Jersey and North Jersey Properties. (Sections 18.2(a) and (b) of the Settlement Agreement, at 350a).*

This distinction between the liability of the respective defendants and particularly Vogel and E. Rodin vis-a-vis the South Jersey Properties and the North Jersey Properties, permeates the Settlement Agreement and was carefully negotiated and bargained for. (See Sections 1.1; 1.2; 1.3; 1.10; 5.3(a); 7.2; 10.1; 11.1; 12.3; 13.4; 14.1; 18.2 at 269a *et seq.*)

Boklan's liability under the Settlement Agreement is limited to the South Jersey Properties (Section 18.2(a)) even though he admittedly acted as the attorney in all eight transactions.** (see Boklan's Response to Requests for Admissions ¶2, 5, 14, 15, 19 and 29 170a-172a; 203a; 206a-208a; 211a).

In their complaints below plaintiffs alleged that appellant Vogel, a licensed real estate broker, together with

---

* Accordingly, the judgments entered against E. Rodin (who is not appealing did not contest their entry below, and of course did not claim "duress") are larger in amount and are in favor of a greater number of investors. The judgments against E. Rodin in the aggregate exceed those against appellants by $1 million. (7a to 10a; 95a to 104a).

** Boklan admitted receiving attorneys' fees aggregating in excess of $60,000 for acting on behalf of the investors in connection with the purchases of the properties. Boklan's Response to Requests for Admissions ¶7 (172a; 192a; 204a). Plaintiffs charged Boklan with improprieties as an attorney (239a) including acting in conflict of interest. See ¶19, 24 and 29 of the Amended Complaint, also ¶29L (221a-239a). Plaintiffs' counsel Dannenberg filed a complaint against Boklan in January 1975, with the Grievance Committee, of the Second Judicial Department (55a to 56a).

Boklan, E. Rodin and his son Bruce Rodin, were the four principal defendants who wrongfully promoted the investments (110a; 227a-244a).

From July 1974 to January 1975 all defendants below were represented by the law firm of Rogers & Wells (15a; 30a; 82a; 367a). Thereafter until April 1976, only Boklan and Vogel and his corporations were represented by that firm (25a-28a; 39a-41a; 47a-51a). E Rodin and his corporations were represented from January 1975 by the firm Nickerson, Kramer, Lowenstein, Nessen, Kamin & Soll and Bruce Rodin by Fink Weinberger Fredman & Charney (367a). The foregoing three firms represented the respective defendants in connection with and throughout the negotiations and consummation of the Settlement Agreement (34a-41a; 47a-51a; 62a; 65a; 72; 367a). The negotiations extended over four months, commencing in March 1975. The agreement went through numerous drafts (62a).

THE FIRST ATTEMPTS AT SETTLEMENT

After the action was filed, Rogers & Wells on behalf of all defendants immediately attempted to negotiate a settlement. Meetings were held through the summer of 1974, including a meeting at the offices of Rogers & Wells on August 22, 1974 (15a). On September 16, 1974, the attorneys appeared before Judge Neaher to report the results of those negotiations. The docket entries under that date state " . . . Settlement possible. Memorandum to be submitted to the Court." (2a)

That settlement, contemplated a class action settlement, providing for

> "the return to all class members electing to rescind, all moneys they invested . . . plus interest. Other class members who elected to remain

in the ventures would have been given a rebate on their purchase price." (79a)

This was the settlement which the defendants had offered (15a). Because the defendants failed to deposit $400,000 in escrow in October 1974, that proposed settlement failed of consummation (79a-80a).

THE PROSECUTION AND DEFENSE OF THE ACTION AND ITS ULTIMATE SETTLEMENT

Thereafter until the Spring of 1975, the action was vigorously fought. In November 1974, plaintiffs moved for class determination and for partial summary judgment. Defendants in November moved to dismiss the complaint for failure to join indispensable parties; to strike the class allegations from the complaint, and to disqualify Bernard S. Kanton ("Kanton") as plaintiffs' attorney (2a-3a).*

Plaintiffs served a Request for Admissions under Rule 36 which was responded to by appellants Vogel and Boklan in December 1975 (2a; 170a-214a). Commencing in late October 1974, plaintiffs served notices of depositions and subpoenae on seven witnesses including the Chicago Title Insurance Co. and the Bankers Trust Co. and served notices to take the depositions of the defendants (2a-4a). On January 13, 1975, defendants moved for an order staying discovery. On February 7, 1975, appellants Vogel and Boklan served and filed interrogatories upon the plaintiffs (4a).**The taking of the deposition of appellant

---

* The motion filed by Rogers & Wells to disqualify Kanton was solely on the grounds that he as a substantial investor was also a principal, had conducted the investigation, and would be a necessary witness at a trial. There was no mention whatsoever of the alleged conduct now attributed to him in August 1974 by Vogel and Boklan. (Docket Entry and Record Document # 15).

** Those interrogatories, almost two inches thick, filed as part of the Record, consisted of 372 pages and 424 interrogatories each with subparts, and in the aggregate comprised more than 1,000 interrogatories.

Boklan was commenced on February 28, 1975, at the firm of Rogers & Wells (61a), but was not completed, as a result of the settlement (414a-415a).

In March 1975 the parties, solely through their counsel, again commenced settlement discussions, resulting in the Settlement Agreement executed as of July 17, 1975.* After that agreement was executed and delivered, the appellants' co-defendant E. Rodin caused to be mailed in August 1975, a letter to all investors, written by him under date of July 21, 1975, explaining the settlement, in which he stated, among other things:

> "I write to furnish to each of you certain documents and information concerning the settlement of a lawsuit affecting your interests in the joint ventures owning a number of parcels of real estate in New Jersey. I ask that you read the enclosures that accompany this letter with care.
>
> "As you probably recall, *in 1971 and 1972 three joint ventures were established, each of which thereupon purchased and now owns a property in South Jersey; Sy Vogel and I are participating in each of these joint ventures, along with a number of you.* In 1972 five additional ventures were formed, each of which purchased and now owns a property in North Jersey; my son Bruce and I own interests in each of these ventures, together with others of you.
>
> "In mid-1974 about a dozen of the participants in the joint ventures owning the eight properties commenced a lawsuit (the "Litigation") against *Bruce, Vogel, Ken Boklan (the attorney who performed the legal work associated with the*

* When Vogel and Boklan signed in the presence of E. Rodin and in the presence of all defendants' counsel on July 17, 1975, Vogel and Boklan's counsel allegedly knew of the alleged threats previously made (15a to 16a).

establishment of the ventures and the acquisition of the properties, as well as subsequent administrative tasks), complaint sought, among other things, rescission of the joint venture agreements and the return to the participants in the ventures, other than the defendants, of all the money that they had invested. A copy of the complaint, as amended early in 1975, is enclosed; in it you will find a detailed statement of the plaintiffs' claims. The defendants, I hardly need add, deny the truth of a great many of the allegations of the complaint. The court in which the Litigation is pending has not to date passed upon any of the issues.

"*Even prior to the filing of the lawsuit, efforts were made to settle the controversy. These settlement discussions have continued, with only brief interruptions, throughout the year that the Litigation has been pending.* The talks have at last borne fruit and the detailed terms of an *acceptable settlement* have been embodied in a lengthy agreement. A copy of this agreement (the "Purchase Agreement"), together with the schedules to it, is enclosed. The original of it has already been signed by me, as well as by the other defendants in the Litigation who are parties to it."

* * *

"You or your attorney may also speak with my attorneys, the attorneys for Vogel and Boklan, or the attorneys for the plaintiffs in the Litigation about the agreements. The names and addresses of the attorneys for all of the parties are set forth in section 24.2 of the Purchase Agreement. Their telephone numbers in New York City are: Mr. Dannenberg, one of the plaintiffs' attorneys, 212

759-1504; Mr. Larsen, one of the attorneys for Vogel and Boklan, 212 972-7203; Mr. Kalmus, one of my attorneys, 212 688-1100.

* * *

(74a to 76a) (emphasis added)

That settlement had been negotiated in the spring and summer of 1975 by the respective counsel, out of the presence of the parties. The negotiations with Messrs. Kalmus and Soll of the Nickerson firm on behalf of E. Rodin (not appealing) were conducted at the same time as those with counsel for the appellants Boklan and Vogel. Robert Larsen, Esq. of Rogers & Wells represented Boklan and Vogel. (30a-31a; 367a) There were no negotiations by plaintiffs' counsel (Dannenberg and Kanton) conducted with Larsen on behalf of his clients that were not negotiated with Kalmus and Soll. (30a to 31a) At no time during those negotiations were appellants present (ibid).

The only personal contact of substance that the plaintiffs' counsel had with either Vogel or Boklan for the period of some ten months prior to the October 1975 closing of the Settlement Agreement was (i) a conference in December, 1974 at the offices of Rogers & Wells when they were at all times represented by their counsel who were present and (ii) at the deposition of Boklan conducted by Dannenberg at the offices of Rogers & Wells in February 1975.* In fact, Rogers & Wells, a highly respected, national law firm with sophisticated counsel, was very careful to insulate their

---

* Kanton did not attend the Boklan deposition (61a). His recollection in May 1976 was that he had not been in the presence of . . . Boklan or . . . Vogel since December 1974 . . . (61a). Vogel in a "sur-reply" affidavit claimed, however, that ". . . in the spring of 1975," there was an "accidental meeting" with Kanton at East 38th Street and Third Avenue in midtown Manhattan, during a rainy afternoon when Vogel, driving, stopped to offer him a lift. It was a momentary contact (83a).

Vogel did not attend the Boklan deposition.

clients, the appellants from contact with the plaintiffs or their counsel. All communications prior to December 1975 on behalf of the plaintiffs and on behalf of the defendants were routed through counsel. There were no meaningful personal contacts (29a to 30a; 87a). Boklan in his affidavit referred only to the August 22, 1974 conference (21a). He did not offer any evidence of being in the physical presence of Kanton after December 1974 (20a to 23a) and did not deny the assertions that he had not been (61a).

THE ALLEGED "DURESS"

Appellant Vogel in his brief claims that the settlement negotiations were continuous from the summer of 1974 through July 1975. Such was not the fact. After the first proposed settlement failed of fruition, the action was vigorously litigated. (Pages 12 to 16 *supra*). Nonetheless, Vogel's claimed duress rests principally on threats allegedly made at one meeting held at the office of Rogers & Wells on August 22, 1974, wherein "defendants offered to rescind the entire transaction and return all moneys paid by the plaintiffs" (Appellant Vogel's brief, pages 4-5).* It was at this meeting that allegedly "Kanton demanded substantially more than this . . . became very abusive and stated that unless they agreed to a deal which would be entirely satisfactory to him he would go to the Nassau County District Attorney and press criminal charges . . . " (ibid). All defendants were present and subjected to the same alleged threats (15a).

Appellants without similar specificity alleged that "similar threats were repeated by Kanton at subsequent

---

* No corroborating affidavit as to the facts from Rogers & Wells was submitted by Vogel. Vogel relied on hearsay (16a). This is the settlement actually embodied in the Settlement Agreement and was also the substance of the first agreement which failed of consummation in October 1974. See pages 12 to 13 *supra*. No brief has been filed by Boklan to date.

meetings which Vogel attended" (15a). These subsequent settlement negotiation meetings had to have occurred prior to November 1974. There were no such meetings in November or thereafter with Vogel except a December 1974 meeting. Vogel conceded not being in Kanton's presence at *meetings* "after December 1974" and did not claim that such threats had occurred at the December 1974 meeting (61a; 83).*

From January 1975 to May 1976, except for that momentary chance meeting in midtown Manhattan on a rainy afternoon in the spring of 1975, there was absolutely no personal contact between Kanton and Vogel or between Dannenberg and Vogel.

On March 1, 1976, a grand jury in Nassau County did indict appellants Vogel and Boklan and the defendant E. Rodin, which received broad press coverage (67a-69a). That indictment followed "a year-long investigation of the Commercial Frauds Bureau of the Nassau County District Attorney" (55a; 67a-71a).** In July 1975, that office had invited investors to appear before the D.A. and to bring with them cancelled checks indicating their investments "in joint ventures with Eugene Rodin and *Seymour Vogel.*" (55a; 57a; 71a; 84a) (emphasis ours)

Knowledge of that then current criminal investigation was known to the appellants at the time they executed the Settlement Agreement on July 17, 1975, and caused it to be delivered on July 28, 1975, (18a-19a; 57a-58a) and prior to its closing in October 1975.

This knowledge was confirmed by appellant Vogel in his affidavit of May 3, 1976, below where he swore:

---

* Appellant Vogel in his brief claims that Kanton did not deny these occurrences with sufficient specificity. Kanton did deny with specificity (53a; 56a). In any event, Judge Neaher assumed the threats had been made as alleged (92a-93a).

** E. Rodin subsequently pleaded guilty (70a).

"8. Prior to my *actually signing* the agreement I had heard from one of the prior owners of one of the properties involved that he had been asked to come to the Nassau County District Attorney's office for a conference. However, he told me that he had no information as to whether I was involved in what the District Attorney was doing. I nevertheless consulted with an attorney about this *and then voluntarily went to the District Attorney's office and offered to give them whatever information I could. I was told at that time that the settlement of this civil case would have no bearing on the action, if any, which the District Attorney would take. This took place after I had signed the Settlement Agreement but before the Agreement was* signed by all concerned and *delivered to the attorneys for the plaintiffs.*"* (18a-19a) (emphasis added)

Notwithstanding knowledge of his indictment on March 1, 1976, appellant Vogel continued to perform under the Settlement Agreement in connection with closing a contract for the sale of the "220 Property" on March 4th and 5th, 1976 (49a-51a).

Appellants also rely on an implied promise not to prosecute the appellants (appellants' brief pages 9 *et seq.*) There was never a promise made not to prosecute and the record is totally barren of evidence of such a promise, or of facts, from which a promise might fairly be implied. To the contrary, complaints were in fact made in early 1975 (55a-56a; 84a).

---

* Incredibly Vogel in his brief claims he never knew that the investigation involved him. (Appellant Vogel's brief pp. 3, 12-16). Nowhere in his two affidavits below did he make such a claim. He only claimed that he had no knowledge of the availability of defense now raised for the first time. (14a-19a; 81a-88a). Knowledge of the defense will be imputed to him. See page 31 *infra.*

THE STRUCTURE OF THE SETTLEMENT

Appellant Vogel claims in his brief at page 5 that the defendants offered to rescind the entire transaction and return all monies paid by the plaintiffs "but that Kanton demanded substantially more than this", and when they refused "he became very abusive" and made threats of complaints. The settlement to which appellants agreed in the summer and fall of 1975 is the settlement they wanted. It provides for the return to the investors of the monies they paid to the defendants for the purchase and carrying of the properties together with maximum interest from the dates of the respective payments of 25% (89a-90a; Recital "G" at 275a;276a; Section 4 at 288a-289a).* The defendants were to have until late 1977 to sell the properties, June 30th in the case of the South Jersey Properties and September 30th in the case of the North Jersey Properties (66a-Section 1.11 at 279a; Section 4 at 86a-289a). Pending the defendants' attempting to sell the properties, these defendants were to pay the sum of $750,000. in three installments over a one year period, to carry the properties, i.e. mortgage interest and real estate taxes (90a; Section 5 at 289a-293a).

The settlement was a reasonable one, negotiated among businessmen with the view of giving the defendants a reasonable opportunity to sell the real estate which was the subject of the litigation and to return to the investors their monies (74a-78a; 273a-276a). In fact, the July 17, 1975 Settlement Agreement was more favorable to the defendants than the earlier agreement of September 1974 which failed of fruition in October of that year (61a-62a).

---

* Interest is to be computed from an average day of payment at the per annum rate respectively of 7%, 7%, 6% and 5% for the first four years only, aggregating a total of 25%. In certain instances this resulted, as bargained for by the appellants, with the payment of no interest in 1975 or thereafter prior to the entry of judgment (287a; 377a-379a).

ARGUMENT

POINT I

THE APPELLANTS FAILED TO CARRY THE BURDEN OF ESTABLISHING BY CREDIBLE EVIDENCE THE OCCURRENCE OF DURESS. AT THE TIMES OF EXECUTION, DELIVERY, AND CLOSING OF THE SETTLEMENT AGREEMENT, NO DURESS EXISTED. THE THREATS AS A MATTER OF LAW DID NOT CONSTITUTE DURESS. THERE IS NO EVIDENCE IN THE RECORD OF THE COMPOUNDING OF A FELONY. THE APPELLANTS PERFORMED UNDER THE AGREEMENT FOR ALMOST SIX MONTHS. THE COURT BELOW DID NOT CLEARLY ABUSE ITS DISCRETION IN SUMMARILY ENFORCING THE SETTLEMENT AGREEMENT.

Settlements approved by a District Court are to be enforced unless there is a clear abuse of discretion. "Cf" *Newman v. Stein*, 464 F. 2d 689 (2d Cir. 1972), *cert. den.* 409 U.S. 1039 (1972). Summary determinations are proper where reasonable men cannot differ as to the facts and the reasonable inferences to be drawn. *Beal v. Lindsay*, 468 F. 2d 287, 291 (2d Cir. 1972) ["The rule of *Arnstein v. Porter*, 154 F.2d 464, 468 (2 Cir. 1946), that summary judgment may not be rendered when there is 'the slightest doubt' as to the facts no longer is good law."] See also *United States v. Matheson*, 532 F. 2d 809, 813 (2d Cir. 1976) [summary judgment will be utilized to dispose of frivolous issues to avoid "an exercise in futility or a purposeless trial".]* Here

* The case of *Autera v. Robinson*, 419 F.2d 1197 (Dist. Col. CCA 1969), a personal injury action, involved facts totally different from those at bar. There the plaintiff who concededly did not speak English well claimed that her attorney had no authority to accept an oral offer of settlement and that she had not understood the settlement. On those facts, the court directed a hearing. On the undisputed facts at bar, even after a trial, appellants cannot prevail.

plaintiffs-appellees' affidavits, supported by documentary evidence of post-settlement performance and post-settlement acknowledgement of the validity of the Settlement Agreement erase all doubts as to the facts and substantiate the baselessness of the appellants' claims of duress. Cf. *Gill v. Reveley*, 132 F.2d 975 (10th Cir. 1943) [direction of a verdict in favor of the defendants affirmed where no reasonable men could have differed with respect to the facts of the alleged claim of duress].

In view of the settlement, there were no longer issues of fact with respect to the substantive issues of fraud and misappropriation of monies alleged in the amended complaint (227a-246a). The only meritorious factual issues before the Court were whether defaults had occurred under the provisions of the Settlement Agreement and whether judgment should be entered. In this regard, all of the defendants conceded the occurrence of events of default. E. Rodin, a principal defendant (presumably subjected to the same threat of criminal prosecution [15a]) did not oppose the entry of judgment. His counsel knew that he and his co-defendants had no such defense (30a; 65a-66a; 74a-78a).* Defendant Bruce Rodin, represented by separate counsel, opposed the entry of judgment on technical grounds involving interpretation of the agreement (91a-92a).

Only appellants Boklan and Vogel, whose rights and obligations under the agreement had been negotiated at the same time as that of the Rodins, raised the specious and fictitious claim of "duress." They offered no corroborating proof. To the contrary, their own conduct (i) in performing or seeking to perform under the agreement for more than six months, and (ii) in not raising the issue for more than ten months after they executed the agreement and almost two years after the alleged events of duress substantiate the specious character of their claims.

* Obviously Rogers & Wells also knew; otherwise that firm would not have permitted the execution, delivery and closing of the Settlement Agreement.

When a complex business arrangement is negotiated among sophisticated businessmen and professionals by their eminently qualified respective counsel, more than that which was presented below, is necessary to justify a trial of this settlement.

Duress may not be determined in a vacuum. Acts toward an unsophisticated person unrepresented by counsel may constitute duress, but the same acts would not be sufficiently coercive if directed toward a sophisticated businessman or attorney represented by counsel, particularly in the setting of the undisputed facts of this case.

> " . . . three events are common to all situations where duress has been found to exist. These are: (1) that one side involuntarily accepted the terms of another (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party." *Urban Plumbing & Heating Co. v. United States*, 408 F. 2d 382, 389 (Ct. Claims 1969)

None of these elements are present. See *Gill v. Reveley, supra.*

A. *The Alleged Duress Had Been Removed By The Time Appellants Signed and Delivered the Settlement Agreement. And Certainly By the Time of The October 1975 Closing.*

Assuming *arguendo* that the threats of criminal prosecution etc. had in fact been made as claimed by the appellants, the undisputed evidence in the Record establishes that complaints had been made and investigation begun prior to July 17, 1975 (55a-56a; 71a; 84a).

Exhibit 4, annexed to the affidavit of Bernard Kanton, at 71a of the Record, is the form of letter inviting investors to come to the Nassau County District Attorney's office. That letter dated July 14, 1975, clearly shows that the

District Attorney's investigation included Vogel. It stated in part

> "Please bring with you your original cancelled checks indicating your investment . . . in joint ventures with Eugene Rodin and *Seymour Vogel.*" (emphasis added)

Appellant Vogel admitted sufficient facts to warrant the fair and reasonable inference that the source of the alleged duress had been removed prior to the final consummation of the Settlement Agreement.

> "Prior to my actually signing the agreement, I had heard from one of the prior owners of one of the properties involved that he had been asked to come to the Nassau County District Attorney's office for a conference. However, he told me that he had no information as to whether I was involved in what the District Attorney was doing. I nevertheless consulted with an attorney about this and then voluntarily went to the District Attorney's office and offered to give them whatever information I could. *I was told at the time that the settlement of this civil case would have no bearing on the action, if any, which the District Attorney would take.* This took place after I had signed the "Settlement Agreement" but before the "Agreement" was signed by all concerned and delivered to the attorneys for the plaintiffs." (Vogel affidavit May 3, 1976, 18a-19a). (emphasis ours)

Obviously Vogel thought he was involved in the investigation. Why would he consult with an attorney and then go to the D.A., if he didn't think he was involved. Obviously Vogel and the D.A. discussed the investigation and this action, otherwise why would the D.A. have advised that the settlement would have no bearing on the D.A.'s investigation. Vogel's intent was obvious. He was hoping to make a deal.

If he was told at that visit or was led to believe by the circumstances *that he was not the subject of the investigation*, then if Vogel is to be believed, there was no longer any reason for him to proceed with the settlement. For if in fact, as now claimed, the only reason he had proceeded was to avoid prosecution, having been satisfied that he was not the subject of the investigation and having chosen to cooperate with the D.A., his motives in proceeding with the settlement had to lie elsewhere—to wit: "it was a good deal under the circumstances." And if as he claims at 18a, he believed he did nothing wrong, after his visit to the D. A.'s office, there was even less reason for Vogel wanting to stifle a prosecution by settling under the "implied promise" that there would be no prosecution. If on the other hand he had every reason to believe he was the subject of the investigation, then he had to have concluded that the alleged August 1974 threats and alleged subsequent threats of prosecution had come to pass. Further Vogel surely knew that an investigation into the acts of Rodin would inevitably and inexorably involve himself. Could any reasonable person have believed otherwise?

An eleven day period ensued, as appellant Vogel admits, " . . . before the 'Agreement' was delivered to the attorneys for the plaintiffs" and thereafter a two and one-half month period ensued, prior to the closing. (Vogel affidavit, 19a; Cf. also Dannenberg affidavit, 29a-31a). Concededly the agreement was executed many months after the first threats were made; and was delivered with Vogel's authority after his own visit to the office of the District Attorney (18a-19a). Since appellant Vogel already knew an investigation was in progress, he could not have acted under duress of threats to initiate such an investigation by the filing of a complaint with the D. A. His delivery, exchange and closing of the agreement could only have been his voluntary acts, after consultation and investigation by and with his attorneys.

> " . . . in order for a payment of money to be deemed involuntary, it must be made while the duress or coercion is in effect, and a payment made before such duress or coercion arises, or after it has been removed or ceases to exist, is not an involuntary payment within the meaning of the law." 17 N.Y. Jur. Duress and Undue Influence, §4 at p. 210.

Contrary to the claims, now made by appellants Vogel and Boklan, relative to the criminal investigation that had been commenced in the spring of 1975, it is believed that they welcomed the settlement. When they executed the Settlement Agreement and caused it to be delivered in July 1975, they most assuredly believed it would show that they were seeking to make restitution to the alleged victims of their alleged criminal activities. Now that they are no longer performing under the Settlement Agreement they wish to set it aside on the pretext of coercion alleged to have occurred in 1974.

Judge Neaher was clearly not erroneous in finding that:

> "Assuming the alleged threats of criminal prosecution and reporting to the bar association are sufficient to constitute duress, the papers reveal that the 'threats' were effected and the investigation, of which defendants had knowledge, were commenced before the Agreement was executed and closed. It is inconceivable that defendants signed the Agreement hoping that the 'threats' would not come to pass." (93a)

Assuming *arguendo* the threats, there were several alternative actions opened. Appellants and their attorneys could have pressed charges of extortion and unprofessional conduct against plaintiffs' counsel with the D.A. and the Bar Association, for attempting to compound a felony. Finally, and most simply, appellants could have simply

refused to sign the agreement or to deliver the agreement, or to close the agreement. This would appear to have been a reasonable alternative in the light of Mr. Vogel's sworn statement that he then and still today believes that "I had done absolutely nothing that was wrong throughout the entire transaction; and his argument now made for the first time that he didn't know he was the subject of the investigation (Vogel affidavit at 18a).

Appellants' version of what occurred is so incredible that upon close analysis, the District Court could only have come to the conclusion at which it arrived. Appellant Vogel concedes he was at all times represented and guided by eminent counsel ([414] 15a, [¶10], 7a). Yet Vogel, a sophisticated businessman, claims he "struggled" through the agreement unable to "think or operate rationally or effectively." Query: Would competent counsel have let Vogel "execute" or "deliver" or even "close" the agreement under such circumstances, or if the agreement were manifestly unfair to his position. Yet Vogel does not attack the highly professional services rendered by his own counsel.

B. *There was No Duress As A Matter of Law.**

Assuming *arguendo* that threats were in fact made as alleged in the uncorroborated affidavits of appellants Vogel and Boklan, those threats did not constitute legally recognizable duress. *Avey v. Town of Brant*, 263 N.Y. 320, 189 N.E. 233 (1934); *Allstate Medical Laboratories, Inc. v. Blaivas*, 26 A.D. 2d 536, 271 N.Y.S. 2d 371 (1st Dept.

* All parties concede that the substantive law of New York governs. The Settlement Agreement was negotiated and executed in New York and is expressly governed by New York law. See Section 24 (366a). Under the "grouping of contacts" principle, New York law is applicable. *Auten v. Auten*, 308 N.Y. 155, 124 N.E. 2d 99 (1954); *Alland v. Consumers Credit Corp.*, 476 F.2d 951 (2d Cir. 1973).

1966) *aff'd* 20 N.Y. 2d 654, 282 N.Y.S. 2d 268 (1967); *Blumenfeld v. Harris*, 3 A.D. 2d 219, 159 N.Y.S.2d 561 (1st Dept. 1957), *aff'd* 3 N.Y.2d 905 (1957), mot. rearg. den. 3 N.Y.2d 1018 (1957) *cert. den.* 356 U. S. 930 (1958).

In the *Avey* case, the State Court of Appeals reversed and dismissed the complaint, holding that it had not been illegal duress for a town board, in order to force an alleged embezzler to repay monies, to threaten him with prosecution and imprisonment. In finding that the threats alleged were not duress, the Court wrote at p. 321:

> "Payments coerced by duress may be recovered back. 'The coercion, however, must be illegal, unjust or oppressive.' Deshong v. City of New York, 176 N.Y. 475, 479, 68 N. E. 890, 881. The complaint alleges no facts showing that it was illegal, unjust or oppressive for the town to attempt to collect moneys apparently due to it from the supervisor. The words 'wrongfully claimed' state a mere conclusion and do not imply that defendant knew that plaintiff had expended the money for authorized town purposes. *All that is alleged is consistent with threats to enforce what the town believed to be its legal rights, which do not constitute duress.* Benson v. Monroe, 61 Mass. (7 Cush.) 125, 131, 54 Am. Dec. 716." (emphasis added)

At bar, when attorney Kanton threatened in August 1974, to institute criminal prosecutions unless the defendants agreed to rescission, he was doing no more than that which he had a legal right to do. *Avey v. Town of Brant, supra.** Likewise in the *Blumenfeld* case, *supra* the

---

* Likewise Dannenberg's complaint to the Appellate Division in January 1975, about Boklan's conduct was proper. New York State Bar Association Code of Professional Responsibility, Ethical Consideration, EC1-4, 29 McKinney's New York Judiciary Law 360 (1975); (55a-56a). See and compare *Hafter v. Farkas*, 498 F. 2d 587, 589 (2d 1974).

complaint was dismissed and judgment reversed, where the plaintiff, former employee of the defendants, had sued for the return of monies paid by him to them under alleged duress and coercion, to wit threats of arrest. The Appellate Division wrote:

> " . . . nor can threats to enforce what defendants thought were their legal rights, standing by themselves, support an action for monies paid under duress . . . "

The cases principally relied upon by appellant Vogel present completely inapposite fact patterns. There weak, frightened, unsophisticated parties, unrepresented by counsel, were threatened. The threats involved were not direct threats against the signer himself but rather threats against a family member which, by their very nature, were even more coercive. *Haynes v. Rudd*, 102 N. Y. 372 (1886), involved threats by a substantial business enterprise to the parents of one of its former employees that the corporation would have their son arrested and imprisoned immediately if they did not, then and there, sign the proferred note. *Union Exchange National Bank v. Joseph*, 231 N.Y. 250 (1921), similarly involved threats by a large bank to the brother-in-law of a former employee whom the bank accused of embezzlement and whom it threatened to have immediately arrested and imprisoned if its terms were not met.

There was no evidence whatsoever to sustain an agreement expressed or implied that the attorneys who negotiated the settlement attended its execution and its closing, were engaged in the compounding of a felony. If, as appellants urge, appellees' attorneys engaged in such conduct, it must be found that Rogers & Wells, the Nickerson firm and the Fink firm all together engaged in this wrongful conduct. Such a possibility is totally incredulous.

C. *Appellants' Performance Under The Settlement Agreement And Failure To Seek To Avoid It From July 28, 1975 Through March 1976 Constitute a Ratification of the Agreement.*

The documentary evidence establishes substantial performance by the appellants over a period of six months pursuant to the provisions of the Settlement Agreement which they are now seeking to set aside. From July 17, 1975 through October 6, 1975 appellants caused $99,278.69 to first be paid to the Nickerson firm and subsequently to Hecht, the fiscal agent, as their share of the first installment of front money contributions pursuant to Section 5 of the Settlement Agreement (72a-73a; 290a-293a). In December 1975 and in January and February 1976 appellant Vogel and his former counsel, Mr. Larsen, actively sought to renegotiate financing for the Indianapolis Collateral for Dykstra Properties, Inc., and in connection therewith negotiated with Dannenberg pursuant to the provisions of Section 9.1(h) and Section 13.3 of the Settlement Agreement (25a-27a; 34a-41a; 305a-321a).*

In February and March 1976 Vogel negotiated a sale of the "220 Property" with Martin Ettore and obtained Dannenberg's approval to the provisions of the contract of sale, pursuant to Section 10 of the Settlement Agreement (27a-28a; 47a-50a; 310a-314a). That contract was prepared by appellant Boklan (27a to 28a; 46a, 49a). On March 5 and 6, 1976, after the indictment of March 1, 1976, Vogel consummated that contract of sale between Ettore and Hecht, obtained the down payment due under that contract, and arranged for the payment of a portion of that contract down payment to be paid to the attorneys for the first mortgagee (Rigolizzo) (49a-51a).

It is the settled law of New York that

---

* Dykstra Properties, Inc. is another Vogel-E. Rodin corporation (305a).

"A contract entered into under duress is generally considered not void, but merely voidable, and is capable of being ratified after the duress is removed. Such ratification results if the party entering into the contract under duress accepts the benefits growing out of it or remains silent or acquiesces in the contract for any considerable length of time after opportunity is afforded to avoid it or have it annulled. Thus, one who would repudiate a contract procured by duress must act promptly, or he will be deemed to have elected to affirm it." *17 NY Jur. Duress and Undue Influence* §*26* at p. 235.

In failing to raise these claims expeditiously, the appellants are estopped by their laches. Cf. *Merrit v. Libby, McNeil & Libby*, 533 F.2d 1310 at 1314 (2d Cir. 1976); *Tanzer v. Huffines*, 345 F. Supp. 279, 282 (D. Del. 1972); *United States v. Amtraco Commodity Corporation*, 389 F.Supp. 1084, 1087 (S.D.N.Y. 1974).

Nor may the appellant Vogel now claim for the first time that his performance under the Settlement Agreement was without knowledge of this "spurious" defense, first raised in May 1976 after substitution of a new attorney. He did not so state in his affidavits below. Further, in the circumstances of this case the knowledge of Rogers & Wells may be imputed to Vogel. *Farr v. Newman*, 14 N.Y. 2d 183, 187, 250 N.Y.S. 2d 272, 275 (1964). See also *Nolan v. Sam Fox Publishing Co., Inc.*, 499 F. 2d 1394 at 1398 (2d Cir. 1974). Certainly the appellant Boklan, Vogel's attorney for many years and co-defendant had to have knowledge of the defense. (171a to 172a; 193a; 204a to 205a).*

* At printing of this brief during the week of November 1st, appellant Boklan had not yet filed his brief. That brief was due October 12th. See note at page 4, *supra*.

D. *The District Court Did Not Abuse Its Discretion In Enforcing The Settlement, In Summarily Dismissing The Claims Of The Appellants With Respect To Duress, And In Finding That Such Claims Were Interposed Solely For The Purpose Of Delay And Were Frivolous.*

Under all the undisputed facts and circumstances as hereinbefore set forth, it is respectfully submitted that this Court may not have a "definite and firm conviction that the Court below committed a clear error of judgment . . ." in its conclusions. See *Finley v. Parvin/Dohrmann Company Inc.*, 520 F.2d 386 at 390 (2d Cir. 1975). See and compare, *Clarion Corp. v. American Home Products Corp.*, 494 F.2d 860 (7th Cir. 1974). The judgments below should be affirmed.

POINT II

ALL OF THE PARTIES AFFECTED BY THE PROVISIONS OF THE SETTLEMENT AGREEMENT ARE NOT BEFORE THE COURT OR WITHIN ITS JURISDICTION. THIRD PARTIES WHO HAVE RELIED UPON THE VALIDITY OF THE SETTLEMENT AGREEMENT ARE NOT BEFORE THE COURT OR WITHIN ITS JURISDICTION. APPELLANTS UNDER THESE CIRCUMSTANCES SHOULD HAVE COMMENCED AN INDEPENDENT PLENARY ACTION IN AN APPROPRIATE FORUM WHERE THE RIGHTS OF ALL PARTIES COULD HAVE BEEN HEARD AFTER THE JOINDER OF INDISPENSABLE PARTIES.

The settlement was a "global" settlement to dispose of the litigation as to all parties. Appellants insisted upon and bargained for unanimity on the part of all the investors.

Appellants insisted that they sign either the Settlement Agreement or another related agreement [Section 2.1] 283a). Pursuant to the provisions of the Settlement Agreement, the action was in fact discontinued as to four individual defendants and releases exchanged ([Section 8.1(h)] 300a; 411a-413a). The defendants E. Rodin, Bruce Rodin, Godsberg Realty Corp. and Rillstone Properties, Inc., parties to the Settlement Agreement (370a), did not seek to void the settlement or set aside the Settlement Agreement for duress or any other grounds (89a-91a). These appeals may affect their rights, since the judgments final as to them, are joint and several with the appellants (97a).

The fiscal agent, Hecht, has performed under the Settlement Agreement since October 1975, in accordance with its provisions ([Section 15] 337a-341a). Hecht has paid out money to carry the properties and has entered into binding agreements to sell real property to third parties who themselves have expended substantial monies (44a; 51a).

All of the foregoing occurred because appellants did not act timely. Because of appellants' laches and the prejudice to third parties who are not before the Court, this Court should not now disturb the judgments.

POINT III

DOUBLE COSTS AND ATTORNEYS' FEES FOR A FRIVOLOUS APPEAL SHOULD BE AWARDED AGAINST THE APPELLANTS AND THEIR COUNSEL

28 U.S.C. §§1912, 1927;
Acevedo v. Immigration and Naturalization Service, 538 F.2d 918 (2d Cir. 1976);
Fluoro Electric Corp. v. Branford Associates, 489 F.2d 320, 326 (2d Cir. 1973);

Oscar Gruss & Son v. Lumbermen's Mutual Casualty Co., 422 F. 2d 1278 (2d Cir. 1970);
Clarion Corp. v. American Home Products Corp., 494 F.2d 860 (7th Cir. 1974.)
Rule 38 Fed. R. App. Pro.

Plaintiffs-appellees have been substantially prejudiced by these appeals. Their pendency has prevented filing of these judgments in other jurisdictions, 28 U.S.C. §1963; *Lipton v. Schmertz*, 68 F.R.D. 249 (S.D.N.Y. 1976). Accordingly other creditors of the appellants may very well obtain priority. Appellant Vogel conceded to having unsatisfied judgments totalling at least $70,000 already on file against him in the County Clerk's Office of the County of Nassau (31a; 87a).

On October 13, 1976 the District Court (Judge Neaher) recognized that appellees' costs might not very well be satisfied because the appellants' ability to pay costs appears "even more dubious". (See addendum)

In motion papers filed with this Court on September 10, 1976 in support of an application to dismiss the appeal of appellant Boklan, the plaintiffs-appellees' counsel at that time advised this Court of attorneys' time expended having a value of $1,775. (See paragraph 4 to the affidavit of Richard B. Dannenberg sworn to September 10, 1976) Since that date additional substantial attorneys' fee time has been expended in defending these frivolous appeals.*

* Section 18.3(v) of the Settlement Agreement permitting the District Court to award, in its discretion, attorneys' fees, "if the Court shall find that defendants' opposition to the entry of judgment was frivolous or interposed . . . for purposes of delay", was bargained for in order to attempt to avoid such conduct as that of the appellants and their new counsel. (352a-353a). Judge Neaher recognized this in awarding attorneys' fees of $2,480.00 (93a).

CONCLUSION

The judgments entered June 28, 1976 should be affirmed in all respects. Double costs and attorneys' fees should be awarded against the appellants and their attorneys.

LIPPER, LOWEY & DANNENBERG
Attorneys for Plaintiffs-Appellees

Of Counsel
Aaron Lipper
Richard B. Dannenberg

ADDENDUM
MEMORANDUM ORDER OF DISTRICT COURT (JUDGE NEAHER), DATED OCTOBER 13, 1976.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

KARL M. NEIMAND, et al.,
Plaintiffs,

-and-

GEORGE COOPER, et al.,
Plaintiff-Intervenors,

-and-

GEORGE SCHWARTZ, et al.,
Additional Plaintiff-Intervenors,

-against-

MENDON PROPERTIES, INC., et al.,
Defendants.

MEMORANDUM ORDER

Plaintiff-appellee has moved to increase the amount of the bond for costs on appeal from $250 to $2500. This motion may be granted upon approval of the court. Rule 7, F.R.App.P. The purpose of the bond is to provide appellee with sufficient security for payment of costs in the event appellant is unsuccessful on appeal. Defendant-appellant Vogel has not contradicted the affidavit of appellee's counsel indicating that appellant is without assets to satisfy the judgments already outstanding against him.

Appellee's costs being certain to exceed the amount of the bond, the merit of the appeal being dubious and appellant's ability to pay costs of the appeal appearing even more dubious, it is ordered that appellee's motion to increase the bond from $250 to $2500 be granted.

s/ EDWARD R. NEAHER
U.S.D.J.

Dated: Brooklyn, New York
October 13, 1976

2641 LIPPER, LOWEY & DANNENBERG -- NEIMAND v. MENDON

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 8TH day of November 1976 deponent served the within appellee's brief upon LEONMALMAN, 45 N. Station Plaza, Great Neck, N.Y. 11021 and DEAN & FALANGA, 1 Old Country Road, Carle Place, NY 11514

attorney(s) for appellants

in this action, at 45 N. Station Plaza, Great Neck, NY 11021 and 1 Old Country Road, Carle Place, NY 11514

the address(es) designated by said attorney(s) for that purpose by depositing 2 copies of same addressed to each enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this 8th day of November, 1976.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978